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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE:	*	MDL NO. 2753
	*	
ATRIUM MEDICAL CORP. C-QUR MESH	*	MDL Docket No.:
PRODUCTS LIABILITY LITIGATION	*	16-md-02753-LM
	*	
THIS RELATES TO:	*	Case No.:
	*	1:17-cv-742-LM
	*	
CARRIE LEE BARRON and NICHOLAS	*	June 15, 2021
BARRON	*	11:33 p.m.
	*	

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TRANSCRIPT OF STATUS CONFERENCE
HELD VIA VIDEOCONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

<u>For the Plaintiffs:</u>	Jonathan D. Orent, Esq. Megan Johnson Carter, Esq. Fred Thompson III, Esq. Motley Rice LLC
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Russell F. Hilliard, Esq.
Susan A. Lowry, Esq.
Upton & Hatfield LLP

<u>For the Defendants:</u>	Katherine A. Armstrong, Esq. Paul A. LaFata, Esq. Katherine Unger Davis, Esq. Dechert LLP
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Pierre A. Chabot, Esq.
Devine Millimet

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

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P R O C E E D I N G S

THE CLERK: For the record, this is a status hearing in the Barron case, which is 17-cv-742-LM, part of the Atrium MDL, which is 16-md-2753-LM.

THE COURT: Okay. I have the agenda, joint agenda, in front of me and I was thinking I would just go through the joint agenda. Does that make sense to folks?

MR. ORENT: That's fine.

THE COURT: All right. Let me have everybody just identify themselves for the record so the court reporter can get everybody's name down. I'm familiar with all of you, but ultimately I should probably ask you each time to make a record of who's here.

So go ahead and we'll start with plaintiff's counsel.

MR. HILLIARD: Russ Hilliard, your Honor, plaintiff's liaison counsel.

MR. ORENT: Good morning, your Honor. Jonathan Orent.

MR. THOMPSON: Your Honor, my name's Fred Thompson from Motley Rice.

MS. LOWRY: Good morning, Judge. Susan Lowry for the plaintiffs.

THE COURT: Good to see everybody.
Defense counsel?

1 MR. LAFATA: Good morning.

2 MS. ARMSTRONG: Good morning, your Honor. I'm sorry
3 your Honor. Sorry, Paul.

4 Your Honor, Katherine Armstrong for the defendants.

5 I want to apologize for Mr. Cheffo. He has another
6 conflict this morning, so it's going to be me, Mr. LaFata, and
7 Ms. Unger Davis, who can identify themselves.

8 Your Honor, we also may have a couple of summer
9 associates observing, if that's all right with the Court, and
10 let us know if the Court wants us -- wants them to identify
11 themselves for the record.

12 THE COURT: No. It's wonderful to have summer
13 associates watching.

14 Let me just tell anyone watching about our local
15 court rule prohibiting any sort of recording. Even a
16 screenshot of this proceeding violates our local court rules.
17 You seem to know about that, so I won't say anything more, but
18 there may be other members of the public watching this hearing
19 as well, or proceeding, and I just want to make sure that that
20 is clear.

21 All right. I think we have everybody. Good to see
22 everybody this morning.

23 So let's start with the joint agenda. And we've got
24 Barron set for trial July 7th. Luna still does not have a
25 trial date; is that right?

1 MR. LAFATA: That's right.

2 MR. ORENT: That's correct, your Honor.

3 THE COURT: Okay. So we need to probably pick a
4 trial date for Luna. And then, Shumaker, the parties have
5 agreed, should be the third case. And I would not set a trial
6 date for a bellwether trial in this case without consulting
7 with my trusted advisers on the screen here. So don't worry
8 about that.

9 With regard to Luna and a trial date, I think if you
10 can confer and consult with Attorney Esposito, she knows my
11 calendar and she will guard my calendar for me and she can sort
12 of pick a trial date that will work for counsel and will work
13 for the Court.

14 So I think what I'll do is let you do that work
15 behind the scenes and then same with regard to Shumaker. I am
16 open to putting that on when it makes sense for counsel and
17 Attorney Esposito.

18 So that takes care of agenda item number 1, trial
19 logistics and procedures.

20 I still have the jury questionnaire under
21 consideration, you're correct; I'll look at that closer in time
22 to the trial.

23 I have just finished a criminal trial and I am
24 heading into another civil trial next week, so my focus has
25 been trained on those cases and the jury voir dire in those

1 cases, but I can assure you this case follows shortly after and
2 I will train my focus the minute I'm done with my other trial
3 and I will get back to you on the questions.

4 I'm very picky about juror questions, voir dire, and
5 I -- I will tell you that during the pandemic, in the voir dire
6 that occurred in a rather complicated criminal trial I just
7 did, I think I'm pretty careful in making these questions
8 really simple, straightforward, and helpful to the lawyers
9 making their decisions, you know, on whether we move for cause
10 or whether you use a peremptory. So I haven't had a chance to
11 look at your proposed voir dire, but I'm guessing that you come
12 together and ask -- probably put together some good questions.

13 I see Tracy Uhrin was on our screen momentarily. I
14 just want to make sure that Tracy Uhrin who would run the show
15 and has been running all the shows and has earned everybody at
16 the court's respect for the way she's running the show and I
17 know there's a jury trial right now in our courthouse that
18 she's in charge of.

19 So, Tracy, we appreciate you lingering here with us.
20 I want to give you an opportunity to tell them anything they
21 need to know about online voir dire and how you intend to
22 handle that. And obviously we've got a three-week trial, so we
23 need to have the jury understand ahead of time what kind of
24 burden this will mean for them.

25 So go ahead, Tracy. I'll let you poke your head in

1 here and educate us.

2 DEPUTY CLERK UHRIN: So what I'd like to do -- we
3 have a system we can use to send the jury panel a subset of the
4 voir dire questions that you -- that the judge will be asking
5 in the courtroom that you all feel might help you agree to
6 strike certain jurors before they come to the courthouse just
7 based on their response.

8 So the obvious example of that is a question about
9 the schedule. So we will ask the jurors something along the
10 lines of this trial is scheduled to select on June -- July 7th
11 and is expected to conclude on or about this date. And that
12 will give the -- the jurors a chance to tell all of us ahead of
13 time that they have a scheduling conflict that's going to
14 prevent them from sitting on this case. We'll then gather all
15 of the answers and provide them to counsel ahead of time so
16 that you can review them and consult with each other and see
17 whether there are jurors you all agree can be struck for cause
18 before jury selection. It helps the jury selection go faster
19 and it's more -- so it's more efficient for the jurors; it's
20 more efficient for you.

21 So if there are additional voir dire questions that
22 will be asked at jury selection that you think -- if we ask
23 that question ahead of time, just based on the juror's
24 response, we might be able to agree that they -- you know, that
25 they're not going to be a good fit for this case.

1 Then I would propose that maybe by the end of this
2 week, Judge, if that's okay with you and counsel, if -- if you
3 can propose some questions to us that you think you'd like to
4 get to the jurors in advance, we can then send them out to the
5 jurors early next week and collect those responses for you and
6 get you those responses probably by the end of next week, which
7 would give you a good amount of time to review them.

8 Does anyone have any questions about that process?
9 Again, it's not the complete voir dire that the judge will ask
10 in the courtroom. Most of those questions I think you'll need
11 to follow up with the jurors and ask questions and the judge
12 may ask follow-up questions. So we're really looking for the
13 types of questions that will elicit a response that, you know,
14 makes it fairly clear.

15 MR. LAFATA: Tracy, this is Paul LaFata. Just a
16 question to clarify the sequencing.

17 I think the judge had talked about the jury
18 questionnaire that the parties had submitted. Where would that
19 fit in with the -- with the -- I know there's a general form
20 that Attorney Esposito sent to Attorney Orent and I that either
21 has gone out, maybe, and then does the jury questionnaire come
22 after that and then the -- your kind of early voir dire? I'm
23 just trying to understand the sequencing.

24 DEPUTY CLERK UHRIN: Yeah. So when the jurors are
25 summoned, we get that questionnaire that we shared with you

1 all, our New Hampshire juror questionnaire, the general one.
2 When jurors are summoned, that's when they complete those
3 questions. So they've already submitted those. We already
4 have -- hopefully we have most of those responses by now.

5 Then the next thing that would happen is we would
6 send them this kind of subset of the -- the courtroom voir dire
7 questions for your particular case and, you know, the
8 scheduling question and any other that you think might help you
9 decide whether jurors could be struck for cause. We'll do
10 that, in theory, maybe -- maybe that can get to the jurors and
11 maybe even back to you next week. Then we'll ask you to submit
12 before jury selection a list of jurors that you agree can be
13 struck for cause before we get to jury selection. So that's
14 the second step. And then you'll have jury selection with a
15 full set of voir dire questions for your case the judge will
16 read and jurors who are at the courthouse will, you know, let
17 you know whether they have any yes or no -- yes answers to
18 those questions.

19 MR. ORENT: So just in follow up to I guess Paul's
20 question, we had agreed upon a written questionnaire, submitted
21 that to the Court for the Court to review. Would that be -- so
22 that's not the written voir dire or the voir dire that would be
23 asked live in the courtroom. Would this be an opportunity for
24 the potential jurors to answer all of those questions or just
25 some of them or how does that -- that work?

1 DEPUTY CLERK UHRIN: So you were proposing to ask --
2 to -- and this might -- I might not know the details of your
3 case well enough, but you were asking that the jurors complete
4 a questionnaire in advance of selection in addition to the voir
5 dire that would be in the courtroom?

6 MR. ORENT: Correct.

7 MR. LAFATA: Correct.

8 DEPUTY CLERK UHRIN: So I -- obviously that -- you
9 know, that process would be up to the judge, but the way that
10 we get the question -- any questions to the jury could be the
11 same kind of delivery method. We have a date, they just put
12 their participant number and log in to our website, and that --
13 and that gives them the questions and then we're able to
14 extract the answers and send those to you.

15 THE COURT: What document number would that be?
16 Would either Attorney Orent or Attorney LaFata know that and
17 could tell me that and I can consult with Tracy Uhrin about
18 this issue more promptly than I was, frankly, focused on. And
19 I wasn't aware that you were asking for earlier voir dire.

20 So go ahead.

21 MR. LAFATA: Judge, I believe that it is referenced
22 as docket 181, which was filed on December 1st, 2020. This is
23 on page 1 of the agenda. And --

24 THE COURT: It would -- it's document 181?

25 MR. LAFATA: That's how we referenced -- it is.

1 THE COURT: Okay. All right.

2 MR. LAFATA: If I may ask a follow up question about
3 the system, Tracy.

4 Does the system -- if we wanted to take the parties'
5 proposed questionnaire and feed it through that system, would
6 that allow -- I know that you mentioned yes or no questions.
7 Some of the questions have a free text response. Would the
8 system tolerate that and respond to prospective jurors?

9 DEPUTY CLERK UHRIN: Right. So we just -- the
10 answer is just a text box because we tell them if they answer
11 yes to any question, they need to explain their yes answer.

12 MR. LAFATA: Okay.

13 DEPUTY CLERK UHRIN: So we just use a text box
14 response.

15 MR. LAFATA: Thank you.

16 MR. ORENT: I have another question that's in the
17 lines of jury selection and I don't know if this is for you,
18 Tracy, or for the -- the Court.

19 Do they ask -- or do you all ask the jurors whether
20 or not they're vaccinated, potential vaccinated, and is that a
21 qualification criteria? Is that something that the Court looks
22 at?

23 DEPUTY CLERK UHRIN: I can say that we are not
24 currently -- the clerk's office is not currently asking jurors
25 whether or not they are vaccinated. We're not collecting that

1 information.

2 MS. ARMSTRONG: New Hampshire has a very high rate.

3 DEPUTY CLERK UHRIN: We're doing pretty good.

4 MR. LAFATA: So, Judge, one option could be -- and
5 obviously the parties hadn't really talked about this because
6 of the timing, but one option could be use the proposed
7 questionnaire through the system that Tracy mentioned rather
8 than have four parts to the process; could have one less step.

9 THE COURT: Okay. I will look at your questions.
10 I'll consult with Tracy. And you've reached an agreement on a
11 set of questions, so at this point you both agree?

12 MR. ORENT: That's correct, your Honor.

13 MR. LAFATA: And to be clear --

14 THE COURT: Okay.

15 MR. LAFATA: -- these are -- it's a jury
16 questionnaire. I think the parties had intended mutually to
17 seek attorney voir dire in the courtroom and the agreement is
18 on the jury questionnaire in advance of voir dire.

19 THE COURT: Okay. And is it case-specific?

20 MR. LAFATA: Yes.

21 MR. ORENT: Yes, it is, your Honor.

22 THE COURT: Okay. All right. Let me look at that
23 specific document. And I may need to get you on another call
24 really quickly with Tracy to deal with the specifics of that.
25 And it may be that we just need Attorney Orent and Attorney

1 LaFata just to quickly work with Tracy on how that -- how the
2 mechanics of this will work.

3 But I need to look at that and I'm glad you brought
4 it to my attention. I'm thinking that the voir dire is the
5 typical in-court voir dire that I need to do with the venire
6 which will happen, obviously, in this case, but this is
7 something that both of you had agreed you would ask before we
8 even bring these people to our courthouse during a pandemic.

9 So I appreciate that and I will look at it and I'll
10 speak to Tracy about that.

11 MR. LAFATA: Thank you, your Honor.

12 MR. ORENT: Thank you, your Honor.

13 THE COURT: Any other questions while we have Tracy
14 with us?

15 DEPUTY CLERK UHRIN: We finished our jury selection,
16 Judge, so I'm here for as long as --

17 THE COURT: Oh, good. Oh, good. That was a lot
18 faster than my jury selection last week.

19 DEPUTY CLERK UHRIN: Different kind of case, Judge.

20 THE COURT: Yeah. Well, we may be able to do a lot
21 with the for-cause strikes and agreements between counsel to
22 really get us a long way toward our -- our jury. So -- and
23 folks, frankly, have -- and I have to say as a judge, having
24 done many jury trials, I really -- there are things about our
25 procedure during COVID and our protocols that I will keep

1 after -- after COVID is over. So -- but I can describe those
2 to you as we get closer to trial.

3 Anything else?

4 MS. ARMSTRONG: So, your Honor, on -- there's an
5 issue for II. Mr. Orent and I discussed it yesterday. We
6 discussed it after the agenda, but I think it falls within II.
7 And that is, you know, ordinarily under the pretrial order, the
8 parties would have filed objections to the pretrial statement
9 and the exhibits -- and the attachments to the pretrial
10 statements yesterday.

11 Mr. Orent was -- I conferred with Mr. Orent and he
12 wasn't sure that the Court was expecting anything. The parties
13 have exchanged -- had previously exchanged objections to
14 designations. We're still meeting and conferring about them.
15 We sent plaintiffs our objections to jury instructions
16 yesterday and Mr. Orent and I have a meet-and-confer scheduled
17 for Thursday. But we decided before we inundated the Court
18 with a lot of paper that we make sure that we have a good
19 understanding of what the Court is actually wanting us to file
20 at this point.

21 I know we got an email from Donna this morning
22 saying that she needs the exhibit lists, but I'm not sure if
23 that means the exhibit lists with objections. I mean, we had
24 agreed upon -- that the parties would exchange short exhibit
25 lists and just object to those, because frequently a lot of

1 exhibits never come into trial -- the parties may have
2 designated a thousand exhibits and only a tenth of them come
3 into evidence at trial. So we designated short exhibits and
4 exchanged objections to those. The other -- any other
5 objections we think we would handle it in the way that the
6 Court had previously suggested, like morning conferences or
7 afternoon conferences outside the presence of the jury.

8 But that's to say does the Court want us to file,
9 number one, our previously served objections to exhibits; and
10 the second thing was on the actual jury instructions, we want
11 to try to narrow those disputes down as much as possible.
12 There's a significant overlap between our proposed jury
13 instructions. And a lot of times --

14 THE COURT: Yes.

15 MS. ARMSTRONG: -- courts don't actually address
16 those until trial because you have to see how the evidence
17 comes in. If that's the case, we'd like to try to take the
18 time to winnow those down as much as possible and give you the
19 final work product of what's left over.

20 Also in connection with the jury instructions, if
21 the Court has any preliminary instructions, you know, before
22 the jury -- before trial begins, before opening statements, if
23 the Court has any preliminary instructions that you typically
24 give, we'll probably reach agreement on those. So if Ms. --
25 Attorney Esposito could share those with us, that might be

1 helpful.

2 That's sort of where we are and if I have misstated
3 anything, Mr. Orent, please correct me.

4 MR. ORENT: No, I -- that's absolutely I think an
5 accurate description of our discussion yesterday.

6 And I think this was in part predicated, your Honor,
7 on the notion that the Court's normal pretrial statement and
8 pretrial objections are for sort of the typical case where
9 these lists are exchanged for the first time as part of the
10 pretrial statement and there hadn't been the motions in limine
11 arguments that we've already had and the months of discussion
12 between the parties on -- on various objections.

13 So, really, at this point we're just seeking the
14 Court's guidance as to what the Court would like from us so
15 that we're actually meeting the Court's needs while continuing
16 to work together on these issues.

17 THE COURT: Okay. And I just would say I appreciate
18 that your instinct on this is consistent with what I actually
19 would prefer, which is to winnow things down in terms of the
20 paper that you file in front of me. You are 100 percent
21 reading my mind on that, Attorney Armstrong, and I'm sure all
22 of you know me well enough to know that I would rather you
23 reach agreement on everything you possibly can and then just
24 put the limited remaining disputes in front of me before the
25 trial.

1 So with respect to objections to your pretrial
2 statements and other pretrial document exhibits, really, I
3 would rather those objections be for opposing counsel so that
4 you can meet and confer and narrow those and get them down to
5 those things that still remain after you've met and conferred.

6 Same with the jury instructions; the word winnow was
7 used and I would prefer you go ahead and continue winnowing
8 down your disagreements.

9 And with regard to my preliminary instructions, I do
10 give preliminary instructions. They fly above 30 --

11 MS. ARMSTRONG: Your Honor, we lost you.

12 THE COURT: And so I'm -- they're very general. But
13 I will need a case summary from you to -- you know, a general
14 case summary. You may have already filed it. I have to tell
15 you again my focus has been on the trials I'm doing now, but I
16 know this one is going to gain my 100 percent attention the
17 minute I'm done with my next trial because you do come next in
18 line.

19 But I will give a case description. Oftentimes I
20 rewrite what lawyers give me because it's too wordy and I'm
21 reading this to a jury and so I want it to be very easy for
22 them to understand, and sometimes lawyer -- lawyerspeak is a
23 little bit hard to actually tell the jury. So oftentimes I'm
24 just simplifying what you provide to me.

25 But if you can give me a really simple statement of

1 the case that you both agree on, then you're likely to hear it
2 word for word when I describe the case. And I also read that
3 as part of the voir dire process to give the jury a general
4 sense of the case and then I introduce counsel and let you
5 introduce yourselves to the jury.

6 But with regard to preliminary instructions, I am
7 likely to give them the claims and probably give them some
8 elements to give them a sense, but very general.

9 In the criminal trial I just did, for instance, I
10 gave minimal -- I gave them a minimal hint at what the real
11 legal issues were and I promised them I would give them
12 detailed instructions at the end, but I wanted them to have a
13 way of thinking about the evidence as it came in.

14 So I'm happy to take whatever you might give me by
15 way of suggestions, especially if you both agree, with respect
16 to claims and elements. Obviously we're working on jury
17 instructions and those involve claims and what has to be
18 proven. So that -- that could be an ongoing process, and
19 obviously I'll consult with you before. I'll give my
20 preliminary instructions before your openings and you both
21 agree that we pick the jury and then we do openings the next
22 day.

23 I can tell you if we pick the jury and it happens to
24 be fairly simple and swift because -- then I'm inclined to have
25 you just go right into the trial. But tell me why I shouldn't

1 do that, why it would be preferable to wait before we start
2 hearing opening arguments and maybe -- maybe even get a witness
3 in. Now, I'm being optimistic that we will pick our jury in
4 the morning and then we will be ready to go. I just don't want
5 to miss out on an opportunity. If we can get openings done,
6 for instance, that day, I'm going to be inclined.

7 My main -- obviously doing justice is the primary
8 goal here. I guard the jury carefully and I do not want them
9 to twiddle their thumbs. I don't want them breathing shared
10 air during the pandemic. I'm going to be pushing everybody to
11 bring disputes to me ahead of time so that we do not have them
12 lingering. And so having them just go home after we pick them,
13 I'm thinking let's use their time and get them -- at least get
14 the opening arguments, opening statements, done and maybe
15 prepare to put on one witness.

16 But you can talk me out of that. Tell me why that
17 doesn't make sense.

18 MR. LAFATA: Your Honor, this is Paul LaFata. I
19 think the parties conferred about this. One of the aspirations
20 was to try to not cause any inadvertent prejudice by having to
21 start with one side's opening and not being able to complete
22 the other side's opening the same day. I don't think that the
23 reason for this proposal is that if we were to finish at 10:00
24 in the morning with selecting a jury and impanel them then
25 everybody goes home for the rest of the day. That wasn't the

1 intent behind that.

2 I think if we had reading preliminary instructions,
3 voir dire by the Court, voir dire by the parties, that it's
4 hard to predict exactly when that will end and we want to make
5 sure that we are able to at least get a solid amount of
6 material in there without breaking kind of in the middle of a
7 party's discussion with the jury.

8 But -- I don't intend to speak for Attorney Orent,
9 but I think that is -- those are some of the ideas behind the
10 parties' discussions on this subject.

11 MR. ORENT: I would echo what Mr. LaFata said and
12 then add one additional element, which is predictability. And
13 by having sort of a known start time, I know that the vast
14 majority of our experts are flying in from out of town and so
15 the -- the sort of coordination of the various experts and the
16 various witnesses around a particular start time was just a
17 logistically easier thing to do.

18 That all being said, we share the Court's concern
19 and don't want to waste anyone's time, so we'd be happy to do
20 whatever the Court ultimately wishes. But that was our
21 thinking --

22 THE COURT: I have a proposal.

23 MR. ORENT: -- the predictability.

24 THE COURT: I have a proposal. I'll compromise
25 here. If we get that jury picked and I give my preliminary

1 instructions, plan on doing your openings, if you can, if we
2 have time. I won't set it up such that one party does an
3 opening and the next one opens the next day. We'll just let
4 the jury go early. But if we have time, let's agree we're
5 going to do preliminary instructions and opening statements the
6 first day and then we send the jury home, you bring your first
7 witness the next day. How's that?

8 MR. ORENT: That works for us, your Honor.

9 MR. LAFATA: That's fine.

10 MR. ORENT: That's perfect. Thank you.

11 THE COURT: Remind me of that as we get closer to
12 trial, that I promised you that, so that I don't -- I don't
13 forget.

14 Okay. All right. So you had some questions
15 regarding my guidance on sponsoring or tethering witness for
16 each document. I am not sure exactly what that is. It
17 doesn't -- if it's what I think it is, I don't see any
18 necessity for that. I'm guessing that counsel can agree on
19 authenticity of documents, the vast majority of documents, and
20 so maybe you can give me some clarity on that.

21 MS. ARMSTRONG: Your Honor, we had three issues that
22 are listed here, trial issues, and --

23 THE COURT: Yup.

24 MS. ARMSTRONG: -- the parties are in the process of
25 exchanging position papers -- or filing position papers on

1 them.

2 Plaintiff's filed their position paper on item 3
3 yesterday; we're going to be responding on Friday and we're
4 also going to be responding -- we're also going to be filing
5 position papers on 1 and 2 today and then I think the plan is
6 for plaintiffs to respond on Friday.

7 So if it's all right with the Court, we'd like to
8 address these with the Court at the final pretrial conference
9 after both sides have had a chance to get their position papers
10 in.

11 THE COURT: Fine. That's good. All right. So are
12 we done then with II?

13 MS. ARMSTRONG: I think we're done with II.

14 MR. ORENT: I --

15 THE COURT: All right.

16 MS. ARMSTRONG: Well, apparently not.

17 MR. ORENT: Well, within the vein of trial
18 logistics, your Honor, on this issue I did have some just very
19 brief questions to ask the Court in terms of trial logistics.

20 The first one -- and I don't necessarily need
21 answers now, but would be whether or not we will have access to
22 a -- the parties will have access to a war room where we can
23 store materials overnight; the second one was essentially
24 whether the courthouse has WiFi or whether we need to bring
25 that; and then the third and final thing is whether we need

1 special permission for paralegals and other courtroom aides of
2 ours to use technology. So those are --

3 THE COURT: Okay.

4 MR. ORENT: -- essentially the three issues that I
5 wanted to ask the Court about.

6 THE COURT: Okay. And anytime you have these
7 questions, the two of you could get on a call with Attorney
8 Esposito and she can probably answer them for you over the
9 phone.

10 But with respect to a war room, I can't imagine we
11 can't do that. So, again, I would want Tracy Uhrin to say,
12 yes, there's a place that will be -- okay. There she is.

13 Can we give each side a room where they can bring
14 their boxes of documents and such and be with their -- their
15 team and strategize during this three-week-long trial, Tracy?

16 DEPUTY CLERK UHRIN: Yes, we definitely can. There
17 are two conference rooms directly outside the trial courtroom.
18 They're a little bit small. So depending on the size of your
19 team, I might suggest we have some other conference rooms that
20 are in the main hallway where our courtrooms are that are a
21 little larger.

22 So I would say, you know, that the first time you --
23 or the next time you're in the courthouse, let's look at the
24 spaces and we'll figure out and we'll reserve those rooms for
25 you for the duration of the trial.

1 MR. LAFATA: Thank you.

2 MR. ORENT: Thank you.

3 THE COURT: What, do you have two or three
4 documents, Attorney Orent?

5 MR. ORENT: Oh, the other two was whether there's
6 WiFi.

7 THE COURT: Yes. No, I'm going on.

8 WiFi we have. There's a guest network you just get
9 on that guest network. If you want, really, your own WiFi,
10 though, you obviously could bring that.

11 Paralegals, I'm glad Tracy is here so she can lay
12 out the numbers that we use in our COVID courtrooms. But you
13 are permitted in the well of -- there's the well of the
14 courtroom and the jury is over here and then there's the public
15 portion, the gallery, in the courtroom.

16 With regard to the well of the courtroom, Tracy, you
17 interrupt me if I say this incorrectly. The well of the
18 courtroom, each side can have four people, attorneys,
19 paralegals. Okay? So you'll have a table -- actually, the
20 plaintiff's table is front, the defendant's table is back, and
21 I think there's four spots at the defendant's table, only three
22 at the plaintiff's, but we can move a fourth there if you need
23 that, Attorney Orent. But paralegals, other attorneys, your
24 assistants who you want in the courtroom with you, you can have
25 four in the well of the courtroom, four each.

1 Then, with respect to the gallery, there are three
2 reserved spots for each side and then we usually leave I think
3 two for the general public, first come, first serve.

4 And I will tell you that we've been creative.
5 Especially as the numbers have gotten really much better in
6 New Hampshire, during my criminal trial the defendant had many
7 family members he wanted in the courtroom with him. And what
8 we did was Tracy brilliantly came up with the idea that we can
9 keep them in pods. And so we kept family members sort of
10 sitting near each other in separate pods taking up one of those
11 reserved seats. And everybody is fully masked. Those family
12 members in the pods are willing to sit next to each other
13 because they live with each other. Maybe they're fully
14 vaccinated as well. But that's how we accommodated the
15 individual needs of that particular criminal defendant.

16 But -- so I think what I'm trying to say is we can
17 be creative here. We just need advanced notice of who the
18 three people are you're going to have in that courtroom in the
19 gallery. And then with respect to your lawyers and paralegals,
20 just keep it at four, three or four, and you'll be fine. But
21 with regard to those reserved seats, Tracy's going to need to
22 know names the day before.

23 And if you have an expert witness who needs to watch
24 testimony, I can tell you that we have an overflow courtroom as
25 well where the trial is going to be live-streamed on big

1 screens and we will have 15 people in the overflow courtroom.
2 And, you know, if perhaps you needed an expert witness, for
3 instance, to watch testimony, Tracy, we could reserve probably
4 one of those 15 seats for that expert or maybe you give up one
5 of your three seats in the gallery for your expert. You'll
6 make those decisions yourself.

7 So right now this trial's in July. We still have a
8 masking requirement. I'm not demanding vaccination
9 information. Our numbers are good enough in New Hampshire that
10 I can tell you this: We have had criminal trials throughout
11 this pandemic in New Hampshire in federal court, state court as
12 well because we use the same expert. And we -- before there
13 were ever vaccinations on the horizon even, we were doing
14 criminal trials using these same protocols that we're going to
15 use in your trial.

16 Now we have an additional invisible protocol, which
17 is a huge percentage of people in our courtroom will be
18 vaccinated. I won't know exactly whom, but I think a large
19 number of you and a large number, probably, of your witnesses
20 will be vaccinated and probably a good portion of our jury will
21 be. So we have that added safety that makes me comfortable
22 that our protocols, if we keep them in place, are still going
23 to provide us with even more protection than we've had in our
24 prior trials. And I'm still concerned about immunocompromised
25 folks and I would very much predict that we'll still have a

1 matching requirement for that reason in our trial in July.

2 But were the numbers to suddenly drop to such a low
3 number that I felt like the risk was almost -- you know, very,
4 very low, I would consult with you. But I -- I suspect we will
5 keep our mask protocol for now.

6 Dr. Bromage, our infectious disease expert, has told
7 us one person can go without a mask -- and that was even at the
8 height, again, of the pandemic, prevaccine -- one witness in
9 the courtroom, one person, and we have allowed that to be the
10 witness, the testifying witness. And it would be I think best
11 to leave that decision up to you and the witness. And if the
12 witness is fully vaccinated, I think the witness is going to be
13 very comfortable taking off that mask, but if the witness wants
14 to wear a mask, we have clear masks that we've given to all our
15 witnesses and the jury can see their -- the entirety of their
16 face with that clear mask on. So that's how we'll deal with
17 that question as it comes up.

18 Okay. So that answers your third question, Attorney
19 Orent, I think, about paralegals and such. So we'll try to get
20 a room for each of you. We'll also -- we do have WiFi, and my
21 experience with our WiFi is it's very stable. It works well.
22 And then our -- your paralegals -- you can decide where you
23 want them based on the limits of our protocols.

24 MR. ORENT: Thank you, your Honor.

25 THE COURT: All right. Agenda item 3, pending Luna

1 motions, that's just I think a factual agenda item, just for
2 the record, making clear what we've -- what I've ruled on.

3 Agenda item 4, pending Barron motions. Okay. And
4 there is a dispute there. Do you want me to resolve that
5 today?

6 MS. ARMSTRONG: I think item 1 does not need to be
7 resolved today. I think item 2 is more time-sensitive and --

8 THE COURT: That's what I meant, sorry, item 2.

9 MS. ARMSTRONG: Item number 2 is more
10 time-sensitive. We're prepared to -- we've submitted position
11 papers on it. Ms. Unger Davis will be arguing for the
12 defendants if the Court wants to hear argument on it.

13 THE COURT: I have read the position papers on item
14 2 and this is a question, a very limited question, of whether
15 or not I should give Ms. Barron a protective order, in effect,
16 not allowing the deposition to be videotaped. What is the
17 reason that it needs to be videotaped? And let me ask it even
18 more directly so we can make this more succinct.

19 If Ms. Barron is on the stand and you're
20 cross-examining her about a prior statement, you're not going
21 to stop the trial and put her up on video and impeach her with
22 her video testimony; you're going to be using -- a good,
23 effective lawyer is going to be using her transcript. She's a
24 live witness on the stand and you're going to impeach her with
25 what she said two weeks before the trial. I don't envision you

1 using her videotaped deposition to impeach her.

2 Am I wrong about that? Are you thinking that as --
3 that you're going to ask the Court to stop and allow a
4 videotaped deposition to be played so that you can cross her
5 with that? That's my question. Forensically -- what's the
6 forensic reason that you need it to be on video.

7 So somebody go ahead and explain that to me.

8 MS. UNGER DAVIS: Thank you, your Honor. And I
9 think that -- that is a possibility that we have contemplated.
10 I believe in prior trials we have at times used deposition
11 testimony of the parties, of the plaintiff in particular, for
12 impeachment purposes or, you know, other permissible purposes.

13 And the impact, you know, to the jury of being able
14 to see plaintiff's demeanor and her responses I think is, you
15 know, much more impactful and I think that is why the federal
16 rules permit us to take depositions by video and why both sides
17 have in this case taken all depositions by video so far.

18 MS. ARMSTRONG: Your Honor, if I may add also
19 because Ms. Barron is a party, the use of her deposition at
20 trial would not be limited to impeachment. It could be used
21 for all purposes. So it's also possible that we might want to
22 play it in our case in chief.

23 THE COURT: Attorney Orent -- because obviously the
24 rule permits this unless I rule otherwise, so the presumption
25 default is it can be videotaped. I can tell you as a trial

1 judge I would not be interested in having impeachment by video.
2 I can just tell you right now you would have to persuade me
3 that you need the jury to see her videotaped deposition when
4 you have her, you know, sworn statement under oath that you can
5 impeach her with and the jury's watching her being impeached
6 with those statements. So I say that as a preface to warn you
7 that I would not be inclined, unless you persuade me you need
8 the jury to see her face when you're impeaching her. And I'm
9 focused on impeachment here, but I understand what Attorney
10 Armstrong is saying. It might be used in your case in chief.

11 Attorney Orent, tell me why there's good cause to
12 bar them from doing something the rules allow.

13 MR. ORENT: So to begin with, your Honor, this issue
14 of a deposition is only now two weeks before trial coming up
15 before the Court. There has never been a deposition notice;
16 there's never been a formal paper served on plaintiffs; and, in
17 fact, there's never been to date even a request for specific
18 days when the deposition might occur.

19 The only conversation that has occurred between me
20 and defendants was a request for the deposition recognizing,
21 the defendants did, that -- that this was out of time. And in
22 April, the end of April when this issue was first raised,
23 April 28th, I said to the defendants we could squeeze it in,
24 but my concern is doing it on videotape.

25 And so this is now a month and a half ago and we've

1 now burned up most of the time before trial. And I will tell
2 you that Ms. Barron is stretched thin with -- with all of the
3 supports that she's going to need to come to New Hampshire for
4 three weeks. Her husband works full time and getting a date
5 between now and the time we're in New Hampshire is going to be
6 extremely difficult.

7 But the reason I oppose the videotape is for this
8 very point. When the defendants asked for permission to do
9 this deposition, and I was presuming at the time it was going
10 to occur sometime in May, their motivation was to find out what
11 had changed, if anything, since her last deposition. And I
12 said okay.

13 But what I did not say okay to was giving the
14 defendants evidence, newly created evidence, that they could
15 play to the jury in lieu of asking questions of my client.
16 Again, that very point that Ms. Armstrong made. That's not the
17 point of doing a supplemental deposition two weeks before
18 trial. If they are concerned about learning information at the
19 eve of trial that they don't want to be caught off guard with,
20 then an oral deposition will meet that purpose.

21 However, if they are looking to create evidence, to
22 create testimony, to trap the plaintiff, to create some
23 mechanism to play to the jury, that is an entirely other point
24 and that is not something we are willing to do on the eve of
25 trial, squeezing it in.

1 And so that's really it, in part and substance, is
2 what is the purpose that the defendants want? Do they just
3 want to understand how her life has changed? An oral
4 deposition is plenty for that. Or are they seeking to create
5 evidence to play to the jury, which is, in my opinion, a not
6 permissible purpose at this late date. They should have asked
7 us in some earlier time.

8 THE COURT: All right. And, Attorney Armstrong, was
9 it clear to you when you negotiated this agreement and Attorney
10 Orent was willing to do this last-minute deposition that he did
11 not agree to do it via video?

12 MS. ARMSTRONG: I believe so. Ms. Unger, correct me
13 if I'm wrong, but that was where the negotiations broke down
14 was whether it was going to be by video or not.

15 And in terms of what Mr. Orent just said, like, you
16 know, depositions are taken for all purposes. They're taken
17 for discovery, but they're also taken with the intent that they
18 can be played at trial. If we learn something relevant about
19 her medical condition -- and we think we might because she's
20 had certainly pregnancy, among other things, and Ms. Unger
21 Davis can elaborate since we last took her deposition.

22 In terms of timing, we were waiting to get all the
23 medical records in before we asked for a supplemental
24 deposition and that process was delayed. It's a long process
25 to begin with and it was delayed even further by COVID. And

1 when we got to it, we asked for a supplemental deposition.

2 But if she says something that is probative on the
3 issue of causation, we want to be able to get that information
4 to the jury and we think that the most -- the best way of
5 getting it is through a videotaped deposition, where she --
6 where the jury can judge her credibility, her demeanor and
7 credibility.

8 THE COURT: Okay. And, Attorney Orent, you agreed
9 to this, obviously, a while ago, a few -- a month, six weeks
10 ago in concept. I suspect you agreed that there was merit to
11 the request for this last-minute deposition. Am I right about
12 that?

13 MR. ORENT: Your Honor, I -- I actually didn't agree
14 that there's merit. I quite frankly don't think that there's a
15 need based on the medical records, but I wasn't going to create
16 an issue of it because we had enough runway space. That is, we
17 had plenty of time to squeeze in two hours before trial, that
18 it wouldn't interfere, and I didn't see the harm in giving them
19 voluntarily some testimony. I don't believe that there's going
20 to be much change in circumstances from the last deposition.

21 THE COURT: Okay.

22 MS. ARMSTRONG: Your Honor -- your Honor, just --

23 THE COURT: Go ahead real quick.

24 MS. ARMSTRONG: Just in terms of the runway, we
25 think there's still plenty of time to do a two-hour deposition

1 and whether it's videotaped or not does not affect, you know,
2 the timing of the deposition.

3 THE COURT: All right. I understand that this is a
4 default rule and I understand the reason for it, so lawyers can
5 do videotaped depositions without having to run to court to get
6 permission. It is the default. I can understand why it would
7 be useful in the typical case.

8 However, this is not a typical situation and I
9 don't want -- I don't want attorneys who are very agreeable and
10 meet -- have a meeting of the minds on something to end up
11 getting bitten by their willingness to agree to something. And
12 I'm talking right now about Attorney Orent's willingness to
13 agree to the last-minute deposition which accomplishes really
14 your greatest goal here, to find out information about her
15 recent pregnancy.

16 But with respect to the videotaping of that, I am
17 going to say that I'm not going to allow it. I'm going to
18 grant a protective order. So get the deposition done and do it
19 without videotaping. I find there's good cause to grant the
20 protective order on that.

21 So I think we're through the agenda and we'll have
22 other issues that we need to discuss. Anything else before we
23 get off?

24 MS. ARMSTRONG: Not from defendants, your Honor.

25 MR. ORENT: Not from the plaintiffs either, your

1 Honor.

2 THE COURT: All right. I would like to go into a
3 sealed proceeding for the moment.

4 So Donna is, and our court reporter, still with us.
5 I'd like this conversation to be under seal.

6 Is our court reporter with us?

7 THE COURT REPORTER: Yes, I am.

8 THE CLERK: Judge, I'm sorry. There are people on,
9 you know, observing. Do you want to go into a breakout room
10 or --

11 THE COURT: Let me do this, Donna. Can we reconvene
12 and obviously the people on the screen can call back in? Can
13 we reconvene such that there's nobody -- no members of the
14 public, no other people watching, and it will be sealed. It
15 will be very, very brief. I want to inquire about something.

16 THE CLERK: Yes. I'll end this session, Judge, and
17 then just everybody use the same link and I'll just let in the
18 people on the screen and the court reporter.

19 THE COURT: Okay. Thank you. Let's -- let's do it
20 that way. Thank you. See you shortly.

21 MR. ORENT: Thank you, your Honor.

22 MS. ARMSTRONG: Thank you, your Honor.

23 (Sealed portion filed under separate cover.)
24
25

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 6/28/21

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR